

NONPRECEDENTIAL

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

EDWIN VEGA,)
)
Plaintiff)
)
v.)
)
GOVERNMENT OF THE VIRGIN)
ISLANDS, VIRGIN ISLANDS)
POLICE DEPARTMENT,)
)
Defendant)
_____)

CIVIL NO. 1998/0161

ATTORNEYS:

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MEMORANDUM OPINION

Finch, Chief Judge

This matter comes before the Court on Defendant Government of the Virgin Islands, Virgin Islands Police Department (VIPD)'s Motion for Summary Judgment. On October 8, 2003, the Court held a hearing on this matter. Although a scheduling order had been issued and Jacqueline Drew (Plaintiff's counsel of record) was given notice of the hearing, neither Ms.

Drew nor Plaintiff appeared at the hearing. Ms. Angela Tyson-Floyd, counsel for VIPD, did appear. For the reasons expressed herein, Defendant's motion will be granted.

I. Background

Plaintiff Edwin Vega brings this employment discrimination action alleging that Defendant VIPD discriminated against him on the basis of his race and national origin, and also that Defendant refused to accommodate him after he became a qualified individual with a mental disability during the course of his employment.

Plaintiff is a Black, Hispanic male. (Pl. Am. Complaint at 2). Plaintiff passed the Sergeant's examination twice and notwithstanding this fact, the VIPD refused to promote Plaintiff to the position of Sergeant. (Pl. Am. Complaint at 15). Plaintiff believed he was being harassed on the basis of his race and national origin and consequently filed a Title VII claim with the EEOC and the Virgin Islands Department of Labor. (Pl. Am. Complaint at 16). The VIPD retaliated by denying Plaintiff a deserved promotion and discriminating against Plaintiff regarding other employment terms and conditions. (Pl. Am. Complaint at 17). Plaintiff was constructively discharged by being placed on paid administrative leave on or about January 22, 1998. (Pl. Am. Complaint at 19).

Plaintiff's Amended Complaint alleges: violation of Title VII of the Civil Rights Act of 1964 (Count 1); and violation of the Americans with Disabilities Act (Count 2). Defendant Government of the Virgin Islands, Virgin Islands Police Department (VIPD) now moves for summary judgment pursuant to Fed. R. Civ. P. 56. Defendant sets forth the following bases for this motion:

(1) Count 1 must be dismissed because Plaintiff has not established a prima facie case of race or national origin discrimination nor a prima facie case of retaliatory discrimination actionable under Title VII.

(2) Count 2 must be dismissed because Plaintiff has not established that he is a qualified individual with a disability as defined by the Americans With Disabilities Act (ADA) nor has Plaintiff established a prima facie case of retaliatory discrimination actionable under the ADA.

Plaintiff does not oppose Defendant VIPD's motion.

II. Analysis

A. Standard Governing a Rule 56 Motion for Summary Judgement

Under Fed. R. Civ. P. 56, a court may grant summary judgment only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute involving a material fact is "genuine" where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether such genuine issues exist, the Court must resolve all reasonable doubts in favor of the nonmoving party. Christopher v. Davis Beach Co., 15 F.3d 38, 40 (3d Cir. 1994). The burden of proof for summary judgment lies with the moving party. Adickes v. S.C. Kress & Co., 938 U.S. 144 (1970). A trial court should not act other than with caution in granting summary judgment, and may deny summary judgment where there is reason to believe that the better

course would be to proceed to a full trial. Anderson, 477 U.S. at 254.

Defendant has moved for summary judgment on all of Plaintiff's claims. Therefore, each count of Plaintiff's amended complaint will be analyzed in turn.

B. Defendant's Motion for Summary Judgment as to Count 1

Count 1 of Plaintiff's Amended Complaint alleges that Defendant's actions violated Title VII of the federal Civil Rights Act. Regarding Plaintiff's Title VII claim, Defendant moves for summary judgment because Plaintiff has failed to establish that the VIPD intentionally or invidiously discriminated against him based on his race or national origin and because Plaintiff has failed to establish a prima facie case of retaliatory discrimination actionable under Title VII.

Plaintiff's Title VII Discrimination Claim

In considering a summary judgment motion on a Title VII discrimination claim, the Court must consider whether there is a genuine issue of material fact in light of the established three-step, burden-shifting procedure for establishing a Title VII violation. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1993). Under that procedure, the *plaintiff* must create an inference of discrimination by establishing a prima facie case of discrimination. If he does so, the *defendant* must then "articulate some legitimate, nondiscriminatory reason for the employee's rejection". Id. at 802, 93 S.Ct. at 1824. The *plaintiff* may then attempt to show that defendant's reasons are simply a pretext for discrimination, or may present other evidence to show that discriminatory intent was more likely the cause of the employer's actions. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095 (1981).

1. PART ONE: Plaintiff's Prima Facie Case

Plaintiff first must carry the initial burden of establishing a prima facie case of unlawful discrimination. This may be done by showing (i) that he belongs to a protected class; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. McDonnell Douglas, 411 U.S. at 802.

As a Black male of Hispanic national origin, Plaintiff is a member of a protected class. Yet Plaintiff has not directly alleged that he was qualified for and applied for the position of Sergeant. Plaintiff does allege that he passed the Sergeant's exam on February 26, 1996, but it is not clear whether such action is considered applying for the position of Sergeant nor whether there are additional prerequisites for promotion. (Pl. Am. Compl. at ¶15). Plaintiff seems to contend that he experienced rejection in alleging that VIPD refused to promote him. (Pl. Am. Compl. at ¶15). However, Plaintiff does not indicate that the position of Sergeant (or any other position to which Plaintiff may have been promoted) remained open and that VIPD continued to seek equally qualified applicants. More importantly, Plaintiff has not yet produced evidence to support any of the four prongs necessary for a prima facie case of discrimination.

Even if the Court were somehow able to find that Plaintiff met the elements of a prima facie showing under McDonnell Douglas, Plaintiff's case would not survive summary judgment for the reasons set forth below.

2. PART TWO: Defendant's Burden to Rebut Prima Facie Showing

If Plaintiff succeeded at establishing a prima facie case, the burden of production would shift to Defendant VIPD to "articulate some legitimate, nondiscriminatory reason for the

employee's rejection." McDonnell Douglas, 411 U.S. at 802. An employer satisfies its burden of production by introducing evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the unfavorable employment decision. Burdine, 450 U.S. at 253.

In the instant case, VIPD asserts that Plaintiff was one of five police officers at the bottom of the eligibility list in 1996 who did not get promoted and that failure to promote Plaintiff bore no connection with Plaintiff having filed charges of discrimination. (Def. Mo. at 27). This would be sufficient to meet VIPD's relatively light burden of production and establish a genuine issue rebutting Plaintiff's prima facie showing. See Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). Thus the burden would shift back to Plaintiff.

3. PART THREE: Plaintiff's Burden to Show Pretext for Discrimination

Once an employer articulates a legitimate reason for the unfavorable employment decision, the burden of production would rebound to the plaintiff, who would need to show by a preponderance of the evidence that the employer's explanation is pretextual (thus meeting the plaintiff's burden of persuasion). Fuentes v. Perskie, 32 F.3d 759, 763 (3rd Cir. 1994). To defeat summary judgment when the defendant answers the plaintiff's prima facie case with legitimate, non-discriminatory reasons for its action, the plaintiff must point to some evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action. Id.; Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 523 (3d Cir. 1992). Such evidence may be the same evidence used in Plaintiff's prima facie case. Texas Dept. of Community Affairs v.

Burdine, 450 U.S 248, 254 (1981). In the instant case, Plaintiff has provided no evidence to counter Defendant VIPD's legitimate explanation of its failure to promote Plaintiff.

Therefore, even if the Court could find that Plaintiff established a prima facie case of discrimination under prong one of the McDonnell Douglas test, Plaintiff's claim under prong three that VIPD failed to promote him in violation of Title VII, clearly fails to meet its burden.

Plaintiff's Title VII Retaliation Claim

In addition to Plaintiff's "failure-to-promote" claim, Plaintiff avers that VIPD retaliated against him, in violation of Title VII, for his decision to pursue his civil rights.

In order to establish a claim of retaliation under Title VII, a plaintiff must prove that (1) he engaged in an activity protected by Title VII, (2) the employer took an adverse employment action against him, and (3) there was a causal connection between his participation in the protected activity and the adverse employment action. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir. 1997). Plaintiff alleges that VIPD continued to deny him a promotion and discriminated against Plaintiff with regard to sick leave, annual leave, no pay and to include illegal suspension, and accusation of fraud in retaliation, for filing a discrimination charge with the Virgin Islands Department of Labor and the EEOC.¹ (Pl. Am. Compl. at ¶ 16 - 17, Ex. 2). Again, VIPD asserts that Plaintiff was one of five police officers at the bottom of the eligibility list in 1996 who did not get promoted and that failure to promote Plaintiff bore no connection with Plaintiff having filed charges of discrimination. (Def. Mo. at 27). It does not appear that Plaintiff has produced any evidence in the pleadings that would show a causal relationship

¹ Plaintiff was also required to file an administrative complaint with the Equal Employment Opportunity Commission ("EEOC") to support his claim of retaliation, which he did. (Pl. Am. Compl. at ¶18, Ex. 2).

between him filing a discrimination claim and him not being promoted to Sergeant or experiencing employment conditions which Plaintiff deemed unfavorable.

C. Defendant's Motion for Summary Judgment as to Count 2

Count 2 of Plaintiff's Amended Complaint alleges that Defendant's actions violated the Americans With Disabilities Act. Defendant moves for summary judgment on the basis that Plaintiff's ADA claim is barred because Plaintiff has not established that he is a qualified individual with a disability as defined by the ADA nor has Plaintiff established a prima facie case of retaliatory discrimination actionable under the ADA.

Plaintiff's ADA Discrimination Claim

Plaintiff alleges that he became a qualified individual with a disability, as defined by the act, during the course of his employment. (Pl. Am. Complaint at 6). According to Plaintiff, the Director of the Department of Mental Health advised Defendant (as early as December 28, 1993) that Plaintiff should be transferred to a nonviolent government job if possible. (Pl. Am. Complaint at 8). Also, Plaintiff asked VIPD to accommodate his handicap by changing his position from "Beat Cop" to a less stressful position. (Pl. Am. Complaint at 9). The VIPD did not accommodate Plaintiff but instead removed Plaintiff from his duty. (Pl. Am. Complaint at 10 - 11).

Dr. Cora Christian informed the VIPD of Plaintiff's handicap and need for accommodation on October 19, 1994. (Pl. Am. Complaint at 12). However, VIPD refused to give Plaintiff "light work." (Pl. Am. Complaint at 12). Plaintiff received no income from VIPD from mid-December 1994 to January 1995. (Pl. Am. Complaint at 13). When Plaintiff was

returned to work in April 1995, VIPD again refused to place Plaintiff in an accommodated position. (Pl. Am. Complaint at 14).

Although Plaintiff has made all of these allegations in his Amended Complaint, again Plaintiff has failed to produce any evidence which would support his allegations.

Plaintiff's ADA Retaliation Claim

The Third Circuit has held that there are 2 theories, pretext and mixed-motive, under which a Plaintiff may establish a prima facie case for an ADA claim based on retaliation. See, e.g., Shellenberger v. Summit Bancorp, Inc., 318 F.3d 183, 187 (3d Cir. 2003). The Third Circuit has laid out the elements of a pretext claim of retaliation as follows:

[I]n order to prevail under a "pretext" theory of illegal retaliation "a plaintiff must show: (1) protected employee activity; (2) adverse action by the employer either after or contemporaneous with the employee's protected activity; and (3) a causal connection between the employee's protected activity and the employer's adverse action." Krouse v. Am. Sterilizer Co., 126 F.3d 494, 500 (3d Cir.1997). If the plaintiff is able to establish these elements of his/her prima facie case, "the burden shifts to the employer to advance a legitimate, non-retaliatory reason for its adverse employment action." Id. If the employer satisfies that burden, the plaintiff must then prove that "retaliatory animus played a role in the employer's decisionmaking process and that it had a determinative effect on the outcome of that process." Id. at 501.

Shellenberger, 318 F.3d at 187.

Under a mixed-motives theory, however, a plaintiff is only required to demonstrate that the defendant's retaliatory motive was a "substantial motivating factor" in the employment action taken against the plaintiff. Id. at 187 - 188 (quoting Watson v. Southeastern Pennsylvania Transp. Auth., 207 F.3d 207, 215 (3d Cir.2000)).

Just as with the Title VII retaliation claim, Plaintiff alleges that VIPD continued to deny him a promotion and discriminated against Plaintiff with regard to sick leave, annual leave, no

pay and to include illegal suspension, and accusation of fraud in retaliation, for filing a discrimination charge with the Virgin Islands Department of Labor and the EEOC. (Pl. Am. Compl. at ¶ 16 - 17; Ex. 2). On the other hand, VIPD holds that there were five police officers at the bottom of the eligibility list in 1996 who did not get promoted which included Plaintiff and this was unrelated to Plaintiff having filed discrimination charges. (Def. Mo. at 27). There is no evidence in the pleadings to suggest that Plaintiff filing a discrimination claim was causally related to him not being promoted to Sergeant or experiencing employment conditions which Plaintiff deemed unfavorable, nor that Plaintiff's filing was a substantial motivating factor.

III. Conclusion

Although Plaintiff initiated this employment discrimination lawsuit in 1998, it appears that Plaintiff has since failed to produce any evidence or engage in any discovery. Plaintiff's case relies solely on the allegations that Plaintiff himself has made. No evidence has been presented to support Plaintiff's claims and no opposition has been filed to Defendant VIPD's Motion for Summary Judgment. By holding a hearing on this matter, the Court afforded Plaintiff with yet another opportunity to defend his case and show cause why Defendant's motion should be denied. Plaintiff has failed to appear and the Court cannot find any reason to deny summary judgment in this case.

For the foregoing reasons, Defendant VIPD's Motion for Summary Judgment will be granted. An appropriate Order is attached.

ENTER:

Dated: October 8, 2003

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:

Wilfredo F. Morales
Clerk of the Court

By: _____
Deputy Clerk

cc: Honorable Jeffrey L. Resnick, U.S. Magistrate Judge
Angela P. Tyson-Floyd, Assistant Attorney General
Jacqueline A. Drew, Esq.